IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL (LODGING) NO.993 OF 2003
IN
ARBITRATION PETITION NO.218 OF 2003

Union of India ....Appellant

V/s.

Moti Enterprises ....Respondent

WITH

APPEAL (LODGING) NO.994 OF 2003
IN
ARBITRATION PETITION NO.217 OF 2003

Union of India ....Appellant

V/s.

Moti Enterprises ....Respondent

Mr.Suresh Kumar for the Appellant.

Mr.A. Rajadeksha for the Respondent.

CORAM : A.P. SHAH AND
S.J. VAZIFDAR, JJ.
DATED : 22ND FEBRUARY, 2005.

ORAL JUDGMENT (PER S.J. VAZIFDAR, J.) :

1. These Appeals are filed against the orders and judgments of a learned single Judge dismissing the

Appellants' Petition under Section 34 of the Arbitration and Conciliation Act, 1996 (for short "the said Act") for setting aside the award of the learned sole Arbitrator. The learned counsel stated that the decision in Appeal (Lodging) No.993 of 2003 will govern the decision in Appeal (Lodging) No.994 of 2003. We shall for convenience refer to the facts in the former Appeal.

2. The Appellants invited tenders for certain construction work. The Respondent was the successful tenderer. The Appellants therefore, accepted the Respondent's tender by a letter dated 29th November, 1997. The agreement was governed by the terms and conditions contained in the said letter and other documents such as the General Conditions of Contract for Lump Sum Contracts, Special Conditions of Contract, Particular Specifications, Drawing and MES Standard Schedule Of Rates. The contract was signed between the parties on 4th February, 1999. Disputes and differences having arisen between the parties the Respondent invoked the arbitration clause. The Respondent claimed an amount of Rs.1,88,14,887/-. The learned Arbitrator on 30th December, 2002 made the award and on 9th January, 2003 amended the same.

3. The learned single Judge by the impugned order dated 21st July, 2003, dismissed both the petitions holding that all the contentions raised before the learned Arbitrator had been taken into consideration ; that the findings are within the jurisdiction of the Arbitrator and that the same could not be challenged in a Petition under Section 34 of the said Act.

4. Mr.Suresh Kumar, the learned counsel appearing on behalf of the Appellant confined the challenge to the award in respect of four claims. We will deal with each of them separately.

5. The learned Arbitrator awarded an amount of Rs.1,99,548/- in favour of the Respondent on account of wrong price adjustment in respect of Deviation Order (D.O.) No.27. The claim and the award in respect of this deviation order pertained to price adjustment for the provision of certain sanitary fittings such as wash basins and W.Cs. of one make in lieu of the makes specified in the contract. The challenge was based on Condition 62 (G) of the General Conditions of Contracts For Lump Sum Contracts (I.A.F. W-2159). It is an admitted position that these conditions were part of the terms and conditions

between the parties. Condition 62 reads as under :-

> "**62. Valuation of Deviations. -** The value of items of work covered by deviation orders shall be ascertained by measurements or lump sum assessment in the following order of precedence :-
>
> .....
>
> (G). For all Contracts -
>
> . If any Work, the rate for which cannot be obtained by any of the methods referred to in paras (A) to (E) above, has been ordered on the Contractor, the rate shall be decided by the G.E. on the basis of the cost to the Contractor at Site of Works plus 10% to cover all overheads and profit. Provided that if the Contractor is not satisfied with the decision of the G.E., he shall be entitled to represent the matter to the C.W.E. within seven days of receipt of the G.E.'s decision and the decision of the C.W.E. thereon shall be final and binding."
>
> .....

6. It is admitted that the jurisdiction of the Arbitrator to decide the claim based on the deviation orders including this deviation order was never questioned in the arbitration proceedings itself. This point was raised only after the award was passed. Even assuming that not having challenged the jurisdiction of the learned Arbitrator, it is open to the Appellant to challenge the award on this ground in a Petition under Section 34 of the said Act there is

no merit in the contention. In fact this contention is unfair to the learned Arbitrator.

7. As rightly pointed out by Mr.Rajadeksha, the learned counsel appearing on behalf of the Respondent, the deviation orders were submitted by the Respondent to the Appellant. They were not decided by the Garisson Engineer (G.E.). The deviation orders were not issued by the Appellant. This was the grievance of the Respondent before the learned Arbitrator. In these circumstances, the parties expressly agreed to leave this aspect of the matter to the decision of the learned Arbitrator. This is clear from the entire award dealing with the deviation orders.

8. In view of the grievance of the Respondent, the Appellant finalised, during the course of the arbitration proceedings, all the deviation orders upto serial No.32 including the said deviation order no.27 the award in respect whereof is under challenge. Thereafter the Respondent was directed to take these deviation orders as the basic documents and to state their objections, if any, in respect thereof. Each deviation order under objection was discussed and argued by the parties before the learned Arbitrator. The procedure was followed in respect of all the

disputed deviation orders. Thereafter the Appellant placed on record its arguments before the learned Arbitrator.

9. It is obvious therefore why the Appellant never questioned the jurisdiction of the Arbitrator by invoking the provisions of Clause 62 (G) of the General Conditions of Contracts.

10. The learned Arbitrator thereupon considered in detail the rival cases and gave a detailed reasoned award in respect of each of the deviation orders including deviation order No.27. As far as the decision of the Arbitrator on merits is concerned, there was no real grievance on the part of the Appellant.

. In the circumstances, we are unable to accept Mr.Suresh Kumar’s challenge to the award in respect of deviation order No.27.

11. Mr.Suresh Kumar then challenged the award in respect of the Respondent’s claim pertaining to changes executed at site but for which deviation orders regularizing the same had not been finalized and issued by the Appellant. In respect of a part of

the Respondent's claim No.1 in the sum of Rs.1,25,798/-, it was contended on behalf of the Respondent that the change was not ordered and that the contractor executed a part of the work without being authorised to do so. It is contended on behalf of the Appellant that the Appellant had permitted only a part of the work to be executed and that therefore the Respondent was not entitled to the entire amount claimed in respect of the said claim. The claim was for 3.5 cm bituminous carpet. The Appellant's contention was that only 2.0 cm bituminous carpet was authorised.

12. This contention however was specifically raised before the learned Arbitrator who held that he did not accept the Appellant's contention that the Respondent executed this change on his own without any order from the department. The learned Arbitrator therefore awarded an amount of Rs.1,05,750/- being the difference due to the Respondent. This is a finding of fact which the learned Arbitrator arrived at after considering the evidence. The challenge to the award in this respect must therefore fail.

13. Mr.Suresh Kumar then challenged the award in respect of claim No.2 raised by the Respondent

pertaining to the provisions of MS grills to windows. It was submitted that the learned Arbitrator had no jurisdiction to award the said amount in view of Condition 6-A of the General Conditions of Contracts which reads as under :-

> **"6A. Discrepancies and Adjustment of Errors (Applicable generally to Measurement and Lump Sum Contracts)** - The several documents forming the contract are to be taken as mutually explanatory of one another, detailed drawings being followed in preference to small scale drawings and figured dimensions in preference to scale.
>
> In the case of discrepancy between Schedule "A", the Bills of Qantities, the Specifications and/or the Drawings the following order of precedence shall be observed :-
>
> (a) Descritpion of Schedule "A"/Bills of Quantities.
>
> (b) Particular Specification
>
> (c) Drawings.
>
> (d) General Specification.
>
> If there are varying or conflicting provisions made in any one document forming part of the Contract the Accepting Officer shall be the sole deciding authority with regard to the intention of the document and his decision in this respect shall be final and binding."

14. It is clear on a plain reading of this clause that the Accepting Officer is the sole deciding

authority with regard to the intention of the document and his decision in this respect shall be final and binding only if there are varying or conflicting provisions made in any one document forming part of the contract. The fallacy in Mr.Suresh Kumar's submission is that there is in fact no variation or conflict in any such contractual document in so far as claim No.2 is concerned. We repeatedly asked Mr.Suresh Kumar to show us the provisions in the contract documents which were at variance or in conflict with each other. He failed to do so.

15. This was never even the case of the Appellant itself. Mr.Rajadeksha submitted that in fact the item viz. MS grill are not included in the contract. The question therefore of there being any conflict or variance regarding the same in any contractual document cannot and does not arise. In this regard Mr.Rajadeksha relied upon a letter dated 14th June, 1999 addressed by the Appellant to the Respondent in which the Appellant expressly stated that :

> "These MS GRILL are not included in the contract. A proposal to order provision of MS GRILL has been initiated by this office. But AIP has not been accorded by GE/CME/CE (K) Mumbai. As per agreed condition of contract under condition 7 of IAPW-2249 you will not execute any

work without written order to you."

16. In these circumstances, the learned Arbitrator inter-alia held as under :-

> "As such I find that there are no conflicting or varying provisions in any one document requiring the Accepting Officer to give final and binding decision under condition 6A of IAFW 2249 and the decision or interpretation given by CE cannot be final and binding in terms of condition 6A of IAFW 2249. In view of above UOI's contention about arbitrability of this claim stand rejected and I conclude that I have got the jurisdiction to arbitrate and adjudicate on this claim."

17. We are in respectful agreement with the finding of the learned Arbitrator. Moreover, the learned Arbitrator was entitled in view of Section 16 of the said Act to decide the question as to his jurisdiction which he has done. We not only do not find the decision of the learned Arbitrator in this regard perverse or unsustainable but we are in respectful agreement with the learned Arbitrator.

. In the circumstances, the challenge to the award in respect of Claim No.2 is also rejected.

18. Claim No.12 pertains to damages for breach of

contract resulting due to prolongation of work necessitating extra expenditure such as on overheads, supervision and headquarter expenses. It was submitted on behalf of the Appellant that the claim was not arbitrable in view of condition No.11 (C) of the General Conditions of Contracts.

19. The point is no longer res integra. An identical contention was raised in respect of the same clause in *M/s.Shyam Charan Agarwala & Sons versus Union of India* (Appeal No.1249 of 1996 in Arbitration Petition No.86 of 1995), decided on 8th January, 1997 - MANU/MH/0087/1997. A Division Bench of this Court upheld the contention similar to the one raised on behalf of the Appellant in this case. The Supreme Court however set aside the judgment of the Division Bench [(1998) 9 S.C.C. 410.] We will deal with the judgments shortly.

20. Condition 11 reads as under :-

> "**11. Time, Delay and Extension -**
>
> (A) Time is of the essence of the Contract and is specified in the contract documents or in each individual Works Order.
>
> As soon as possible after Contract is let or any

substantial Works Order is placed and before Work under it is begun, the G.E. and the Contractor shall agree upon a Time and Progress Chart. The Chart shall be prepared in direct relation to the time stated in the contract documents or the Works Order for completion of the individual items thereof and/or the Contract or Works Order as a whole. It shall indicate the forecast of the dates for commencement and completion of the various trade processes or sections of the work, and shall be amended as may be required by agreement between the G.E. and the Contractor within the limitation of time imposed in the contract documents or Works Order. If the Works be delayed :-

(i) by force majeure, or

(ii) by reason of abnormally bad weather, or

(iii) by reason of serious loss or damage by fire, or

(iv) by reason of civil commotion, local combination of workmen, strike or lockout, affecting any of the trades employed on the work, or

(v) by reason of delay on part of nominated sub-contractors, or nominated suppliers which the Contractor has, in the opinion of G.E., taken all practicable steps to avoid, or reduce, or

(vi) by reasons of delay on the part of Contractors or tradesmen engaged by Government in executing works not forming part of the contracts,or

(vii) by reason of any other cause, which in the absolute discretion of the Accepting Officer is beyond the Contractor’s control ;

then, in any such case the Officer hereinafter mentioned may make fair and reasonable extension in the completion dates of individual items or groups of items of Works for which separate periods of completion are mentioned in the contract documents or Works Order, as applicable.

Upon the happening of any such event causing delay, the Contractor shall immediately, but not later than 30 days of the happening of the event, give notice thereof in writing to the G.e. but shall nevertheless use constantly his best endeavour to prevent or make good the delay and shall do all that may reasonably be required to the satisfaction of the G.E. to proceed with the works. Extension of time shall be granted as under :-

(a) by G.E. for all Term Contracts ;

(b) by Accepting Officer of the contract for all other Contracts.

In case the Contractor fails to notify the G.E. of happening of an event(s) causing delay within the period of 30 days stipulated in sub-para 3 above, he shall forfeit his right to claim extension of time for the delay caused due to such

event(s).

Extension of time, as granted above, shall be communicated to the Contractor by G.E. in writing and shall be final and binding. PROVIDED THAT in the case of contracts (other than Term Contracts) accepted by the G.E., in the event of the Contractor not agreeing to the extension granted by the G.E., the matter shall be referred to the C.W.E. whose decision shall be final and binding.

(B) If the Works be delayed :-

(a) by reason of non-availability of Government stores shown in Schedule "B" ;

(b) by reason of non-availability or breakdown of Govt. Tools and Plant listed in Schedule "C" ;

then, in any such event, notwithstanding the provisions hereinbefore contained, the Accepting Officer may in his discretion grant such extension of time as may appear reasonable to him and the same shall be communicated to the Contractor by the G.E. in writing. The decision so communicated shall be final and binding and the Contractor shall be bound to complete the works within such extended time.

(C) No claim in respect of compensation or otherwise, howsoever arising, as a result of extensions granted under Conditions (A) and (B) above shall be admitted.

21. The bar contained in Condition 11 (C) would

operate only if the extension is granted under clauses 11 (A) and (B). The question whether the extension falls within the ambit of condition Nos.11 (A) and (B) pertains to the construction/interpretation of the agreement which falls within the jurisdiction of the Arbitrator. Condition 11 certainly required to be interpreted and construed. It is not a clause which requires no interpretation and must simply be applied by the Arbitrator.

22. The Arbitrator after a detailed consideration and analysis of the rival contentions and of the contractual provisions held that the extension granted did not fall within the ambit of condition Nos.11 (A) and (B).

23. Firstly, the learned Arbitrator came to the conclusion that a mere statement on the part of the appellant that the extension was granted under condition No.11 (C) is not sufficient to bring into operation the said clause. We are in respectful agreement with the same. It is certainly open to the Arbitrator to decide whether the extension was within the ambit of condition Nos.11 (A) and (B) in order to determine whether the bar contained in condition No.11 (C) came into operation or not despite the Appellant’s

letter granting the extension. For the Appellant's statement that the extension is under Clause 11 (A) is the Appellant's interpretation of the condition which is not binding on the Respondent and certainly cannot bind the Arbitrator. The dispute regarding the ambit of the clause is one which fell for the decision of the Arbitration.

24. That the Appellant caused the delays necessitating the extensions being granted was not disputed before us. Mr.Suresh Kumar however submitted that an extension even in such cases falls within the ambit of Clauses 11 (A) and/or (B). He submitted that condition 11 (A) (vii) pertains to all extensions irrespective of the circumstances in which the same may have been necessitated. The learned Arbitrator however held that sub-clause (vii) is merely an extension of sub-clauses (i) to (vi) which preceded it. The learned Arbitrator came to the conclusion that the extensions were necessitated by reason of the delay caused by the Appellant and were therefore not governed by sub-clause (vii). He held that sub-clause (vii) cannot be considered in isolation and must be read together with sub-clauses (i) to (vi). He held that sub-clause (vii) does not encompass the reasons or causes which are within the Appellant's control and

where the Appellant is guilty for the delay. In the present case the Arbitrator came to the conclusion that the delay was caused by the Appellant which necessitated the extension.

25. We are in agreement with the construction placed on clause 11 by the learned Arbitrator. The least than can be said is that the Arbitrator's view is a possible view. In any event, the question is no longer res-integra. A learned single Judge of this Court, S.A. Bobde J., had occasion to consider a similar point in the case of *Union of India v. M/s.Mukesh Construction Co. and another,* (Arbitration Petition No.141 of 1997 in Award No.19 of 1997). The submission in that case on behalf of the Petitioner was identical to the submission before us. The contractual provisions are also identical. Bobde, J. has demonstrated clearly how the Appellant's submission is not sustainable in view of the Supreme Court having overruled the judgment of the Division Bench of this Court in *M/s.Shyam Charan Agarwala & Sons v. Union of India* (Appeal No.1249 of 1996, decided on 8th January, 1997), reported in MANU/MH/0087/1997. It is necessary for us to only elaborate upon the judgment of Bobde, J. as the point appears to arise in several matters and as His

Lordship’s judgment is not reported.

26(a). In *S.C.Agarwala & Sons*, as in this case, the extensions were all due to the default committed by the Respondents therein. It was submitted therefore on behalf of the Appellant that the extensions which were granted by the Respondents for execution of the work are not covered by clauses 11(A)(B) of the agreement. The Arbitrator in that case had upheld this contention. The Respondent filed the Petition for setting aside the award. The learned Single Judge set aside the award. Upholding the order of the learned Single Judge and rejecting the Appellant’s contention the Division Bench held as under :-

> "In view of the aforesaid admission in the statement of claim, it is apparent that extensions were granted by the respondents at the instance of the appellants and the appellants have pointed out that the time was extended by the respondents due to reasons which were beyond the control of the claimants. It has been also specifically mentioned that the reason for grant of extensions was all due to bad planning and delay in decision and non-availability of Government stores to be issued under Schedule B.
>
> 5. If this is the position, it cannot be said that extensions

which were granted by the respondents for execution of the work are not covered by clause 11(A) or (B) of the agreement. Extensions were granted at the request of the appellants. As per Clause 11(A), extensions of time granted are final and binding on the contractor. Further, he has never raised any dispute for such extensions. Otherwise matter would have been referred to the C.W.E. Once the said extensions are covered under clauses 11(A) or (B) of the agreement, under Clause 11(C) neither party to the agreement is entitled to claim compensation or otherwise howsoever arising as a result of extensions granted under conditions (A) and (B) of clause 11. Therefore, in our view, the learned Single Judge rightly set aside the award passed by the learned Arbitrator by misconstruing the aforesaid clauses of the agreement.

6. While dealing with similar clause in the case of Union of India v. M/s.Ajit Mehta & Associates & Ors., AIR 1990, Bombay, 45, the Court held that when there was a specific prohibition against entertainment of such claim in the contract, it was certainly not open for the arbitrator to grant the same and if the arbitrators have granted the same, they are guilty of legal misconduct on that count. In such a situation, the arbitrator has not only misread or misconstrued or misunderstood the contract but has acted in excess of what was agreed. It was an error going to the root of his jurisdiction because the arbitrator asked himself the wrong question, disregarded the contract and awarded an amount which was not

contemplated under the agreement."

(b). By its order and judgment dated 7.9.1998 the Supreme Court, over-ruling the judgment held as under:

> "In view of the decision of the Court in P.R.Ravindran v. State of Kerala (1996 (10) SCC 35), the appeal is allowed and the impugned judgment and order of the court is set aside. There will be, therefore, a decree in respect of Claim no.8 of the Award."

(c). As noted by Bobde, J., the citation of K.R.Raveendranathan's case was wrongly given as 1996 (10) S.C.C. 35. This was subsequently corrected by the order of the Supreme Court dated 12th March, 1990 while dismissing a Review Petition filed by the Union of India in that case.

(d). The Supreme Court in *K.R.Raveendranathan's* case held as under :-

> "2. The learned counsel for the appellant points out that the question in issue in the present appeals is squarely covered by the decision of this Court in *Hindustan Construction Co. Ltd.* v. *State of J & K*. In particular, it drew our attention to para 10 of the judgment and the portion extracted from the

> decision in *Sudarsan Trading Co.* case wherein it was said that by purporting to construe the contract the Court could not take upon itself the burden of saying that this was contrary to the contract and, as such, beyond jurisdiction. That is exactly what the Court has done in the instant case. Therefore, the issue stands covered by this decision and the learned counsel for the respondents could not in the face of this decision argue otherwise.
>
> 3. In the result, we allow these appeals and set aside the impugned order of the Division Bench of the High Court with no order as to costs."

27. The judgment of the Supreme Court in *S.C. Agarwala & Sons* (supra) is binding on us. It was in respect of the same clause and on the identical issue.

28. The same clause also fells for consideration before another learned Single Judge of this Court (Dr.D.Y.Chandrachud, J.) in *Union of India v. Moti Enterprises & Anr. 2003 Vol.105(1) Bom. L.R. 560.* The arbitrator in that case had taken the same view as the arbitrator in the present case. On behalf of the Union of India, the award was challenged on the same ground as they have challenged the award in the present case. The learned Single Judge held as under :-

> "The view which has been taken by the learned Arbitrator accords, in my opinion, with a plain construction of the contractual conditions in the present case. The view which has been taken by the Arbitrator cannot be in any manner considered to be perverse or of a nature which would warrant an invocation of the defence of public policy. The Arbitrator was entirely justified in taking the view that if an extension that is granted is not referable to Condition 11(A) and (B), the prohibition contained in Condition 11(C) could not be attracted. However, I must add that even if the view which was taken by the learned Arbitrator was a possible view to take, this Court under Section 34 would not have interfered. In the present case it does so happen that the interpretation taken by the Arbitrator is a correct view to take."

29. We are in respectful agreement with the judgments of both the learned Single Judges in the case of *Union of India v. M/s.Mukesh Construction Company* and *Union of India v. Moti Enterprises.* In the circumstances, the challenge to the award in respect of claim No.12 is rejected.

30. In the circumstances, the Appeals are dismissed. The Appellant shall pay the costs of this Appeal to the Respondents fixed at Rs.2,500/- in respect of each of the Appeals.

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL (LDG.) NO.993 OF 2003
WITH
APPEAL (LDG.) NO.994 OF 2003

DATE OF DECISION : 22ND FEBRUARY, 2005.

For Approval and Signature :

HON'BLE MR.JUSTICE A.P. SHAH

HON'BLE MR.JUSTICE S.J. VAZIFDAR

1. Whether Reporters of Local Papers may be allowed to see the judgement ?)

2. To be referred to be Reporter or not ?)